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No. 88-1897

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE, and COL. R. T. DAVIS, Director,

PETITIONER,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF PETITIONER

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The California District
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No. 88-1897

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RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
THE MICHIGAN DEPARTMENT OF STATE POLICE

Pursuant to Rule 36.3, Rules of the Supreme Court of the United States, ***amicus curiae***, the Appellate Committee of the California District Attorneys Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached amicus curiae brief in support of the Michigan Department of State Police.

Pursuant to Rule 36.2, Rules of the Supreme Court of the United States, *amicus* sought written consent of all parties to the case to file this brief. Although petitioners did grant consent, respondents refused.

The California District Attorneys Association is an association of District Attorneys who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. (See Rule 36.4, Rules of the Supreme Court of the United States).

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 36.4.

Amicus believes that other briefs before this Court do not deal, at least in depth, with the two major issues included in this brief: (1) the procedural issue as to the degree of deference (if any) required to be accorded the findings of the Michigan trial court; (2) the substantive survey in depth of the decisional law of the several states dealing with the constitutionality of sobriety checkpoints. Hence, it is submitted that the brief of amicus will be helpful to this Court.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association cconsisting of the District Attorneys of the State of California aand their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney

of Los Angeles County. Upon review of the instant matter -- which raises the question of, e.g., the methods by which society can protect itself from the appalling carnage wrought on the nation's highways by drunk drivers -- the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. It is for this reason that the Committee seeks leave to file the attached amicus curiae brief herein.

Respectfully submitted on behalf of the California District Attorneys Association, and the District Attorney of Los Angeles County.

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BRIEF OF AMICUS CURIAE

SUMMARY OF ARGUMENT

The position of the Michigan Court of Appeal notwithstanding, no deference is due to the purported findings of the Michigan trial court. Rather, under this Court's decision in United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), in cases involving sobriety checkpoints, deference is to be given to the administrative decisions of higher ranking officials. Moreover, the Michigan courts' illogical conclusion that a low arrest rate implies lack of effectiveness (instead of the opposite) invokes an issue of law. Furthermore, the Fourth Amendment balancing of intrusiveness against important governmental interests necessarily involves a mixed question of law and fact, and necessitates this Court's review of the facts. Finally, the form in which the Michigan Court of Appeal cast its pronouncements on the constitutionality of sobriety checkpoints, as purportedly an unreviewable issue of fact, despite the limited nature of the data so far available, cannot insulate its opinion from Fourth Amendment review by this Court.

On the merits, the majority of appellate decisions dealing with the issue of the constitutionality of sobriety checkpoints have upheld them. Decisions finding constitutional difficulties include cases involving incomplete records, inadequate procedures, or invoking more restrictive state constitutional provisions. Only a few decisions found unconstitutionality per se under the Fourth Amendment. Application of this Court's test in Martinez-Fuerte, supra, 428 U.S., at 555, 96 S.Ct., at 3081, weighing the public interest against the Fourth Amendment interest of the individual, leads to the conclusion that sobriety checkpoints are necessary weapons in law enforcement's arsenal against the scourge of drunk driving while being only minimally intrusive. The same high profile technique which accomplishes deterrence of those who are otherwise tempted to

drive while intoxicated (resulting logically in low arrest rates) also serves to reduce surprise and fear on the part of law-abiding motorists, providing them with assurances of regularity, even-handedness, and minimal interference with their travel schedules.

ARGUMENT

I

NO DEFERENCE IS OWED TO THE FACTUAL FINDINGS OF THE MICHIGAN TRIAL COURT

Although the Michigan Court of Appeals treated this matter as requiring deference to the factual findings of the trial court (Sitz v. Department of State Police, 429 N.W.2d 180, 183 (Mich., 1988), no similar deference is required of this Court. This is true for several reasons.

First, in the case of routine checkpoint stops, this Court has held that "deference is to be given to the administrative decisions of higher ranking officials". (United States v. Martinez-Fuerte, 428 U.S. 543, 566-567, 96 S.Ct. 3074, 3086-3087, 49 L.Ed.2d 1116.) These officials are treated as the counterpart of the magistrate in cases of searches pursuant to warrant. (See Id., 428 U.S., at 566-567, 96 S.Ct., at 3086.) Such officials enjoy "wide discretion" (see id., 428 U.S., at 563-564, 96 S.Ct., at 3085) in factual determinations as to furtherance of the "needs of law enforcement" (see id., 428 U.S., at 562, 96 S.Ct., at 3085, fn. 15), as to "the most effective allocation of limited enforcement resources" (see id., 428 U.S., at 559, 96 S.Ct., at 3083), as to "the choice of checkpoint locations" (see id., 428 U.S., at 562, 96 S.Ct., at 3085, fn. 15), as to avoidance of any location which "bears arbitrarily or oppressively on motorists as a class" (see id., 428 U.S., at 559, 96 S.Ct., at 3083), as to "[m]any incidents of checkpoint operation" (see id., 428 U.S., at 559, 96 S.Ct., at 3084, fn.

13), and "in selecting the motorists to be diverted" for brief questioning at the secondary inspection area (see id., 428 U.S., at 563-564, 96 S.Ct., at 3085).

Within this scheme, the role of the trial and appellate courts is limited to "post-stop judicial review" as to the reasonableness of a particular exercise of administrative discretion in locating and operating a checkpoint. (See Id., 428 U.S., at 559-560, 565-566, 96 S.Ct., at 3083-3084, 3086.) Under the Fourth Amendment the determination of the reasonableness of a seizure is "a conclusion of law". (United States v. Bowles, 625 F.2d 526, 533 (5th Cir., 1980), citing United States v. Mendenhall, 446 U.S. 544, 565-566, 100 S.Ct. 1870, 1882-1883, 64 L.Ed.2d 497, fn. 5 (1980), Powell, J. concurring in part and concurring in the judgment.)

Second, this Court has long held that whether certain facts "establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law." (United States v. Pugh, 99 U.S. 265, 270, 25 L.Ed. 322, 323 (1879).)

Here, in assessing the effectiveness of sobriety checkpoints, the Michigan trial and appellate courts used the evidentiary finding of a resultant low actual arrest rate as a springboard to leap to an "ultimate fact" finding that such checkpoints had a low deterrent effect. (Sitz, supra, 429 N.W.2d, at 184.) Interestingly, the California Supreme Court utilized similar evidentiary facts to reach the opposite finding. (See Ingersoll v. Palmer, 43 Cal.3d 1321, 1339, 743 P.2d 1299, 1318 (1987).) As pointed out by that court, "the number of arrests does not necessarily measure the effectiveness of the sobriety checkpoint. If the checkpoint is properly serving its function - deterrence - it may result in no arrests at all." (Ibid.) Clearly, this Court may properly review a question of simple logic.

Third, where the question is "a mixed one of law and fact", this Court "may review the facts in order correctly to apply the law." (First Nat. Bank of Hartford, Wis. v. City of Hartford,

et al., 273 U.S. 548, 552, 47 S.Ct. 462, 463, 71 L.Ed. 767 (1927).)

Here, the ultimate touchstone for all issues under the Fourth Amendment is the standard of "reasonableness". (Delaware v. Prouse, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979).) Accordingly, "the permissibility of a particular law enforcement practice is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (Id., 440 U.S., at 654, 99 S.Ct., at 1396.) Any such balancing in a particular case would seem to create a mixed question of law and fact.

Fourth, this Court has held that "[s]tate courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact." (Williams v. North Carolina, 325 U.S. 226, 236, 65 S.Ct. 1092, 1098, 89 L.Ed. 1577 (1945).)

Here, the Michigan Court of Appeals apparently held that sobriety checkpoints per se violated the Fourth Amendment because the Michigan trial court had made factual findings that such checkpoints did not significantly further the public interest in curbing drunk driving and subjectively intruded on individual liberties. (See Sitz, supra, 429 N.W.2d, at pp. 183, 185.) By way of contrast, the California Supreme Court has pointed out that "[t]he experience both in California and in other states with sobriety checkpoints has been very limited, and no definitive statistics are yet available. It would be presumptious in the extreme for this court to prohibit the use of an otherwise permissible and potentially effective procedure merely because its effectiveness is at the present time largely untested. Indeed, to do so would prevent the compilation of any data to show its effectiveness." (Ingersoll v. Palmer, supra, 43 Cal.3d, at p. 1339.) Nevertheless, the Ingersoll court went on to point to indications of effectiveness even in the absence of statistical evidence. (See Id. at pp. 1339-1340.)

The form in which the Michigan Court of Appeals cast their disposition of the federal constitutionality of roadside sobriety checks presumptiously makes this issue of concern to law enforcement throughout the United States depend on the provincial findings of a Michigan trial court based on the limited data so far available. Clearly, such procedural blinders cannot be allowed to determine the future construction of the Fourth Amendment.

II

AFTER CONSIDERING THE COMPELLING STATE INTEREST AND LIMITED INTRUSION INVOLVED, THE MAJORITY OF APPELLATE DECISIONS, HAVE HELD SOBRIETY CHECK-POINTS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A

Introduction

Since the authority for excluding any evidence obtained at a sobriety checkpoint must be this Court's interpretation of the reasonableness of the intrusion under the Fourth Amendment, the appellate decisions of state courts, applying the same standard, are particularly relevant. The use of sobriety check-points in numerous states is evidence of the inability to effectively deter the drunk driver through traditional methods. The highway carnage of the drunk driver is recorded daily in the media. As noted by the Illinois Supreme Court in its opinion upholding the constitutionality of the sobriety check-point, United States government surveys established that over half of the highway fatalities occurring in 1982 involved drunk drivers. "Drunk driving is particularly disturbing because it results in the loss of innocent life." (People v. Bartley, 486 N.E.2d 880 885-886 (Ill. 1985).)

The California Supreme Court has recognized the need to deter drunk driving. "The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation." (Burg v. Municipal Court, 35 Cal.3d 257, 262 (1983).) California's highest court is supportive of "'all possible means of deterring persons from driving automobiles after drinking. . . .' [Citation.]" (Peterson v. Superior Court, (1982) 31 Cal.3d 147,

155.) The grass roots creation of organizations, such as Mothers Against Drunk Drivers, to lobby on behalf of legislation to end the alcohol-induced bloodshed on the highway, is illustrative of society's recognition of the need to restrain the drunk driver. The California Legislature has repeatedly changed the driving under the influence laws in an effort to stop the drunk driver by both increasing the likelihood of conviction and the extent of punishment.

Responding to the public's legitimate concern, law enforcement agencies throughout the nation have attempted to combat drunk driving through the use of sobriety checkpoints. This movement was not reflected in the appellate courts of the nation until 1976, when the Supreme Court of South Dakota found a particular sobriety checkpoint to be unconstitutional. (State v. Olgaard, 248 N.W.2d 392 (S.D. 1976).) But the subsequent decisions of this Court in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 139, 59 L.Ed.2d 660 (1979) and Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) gave impetus to the belief that under the reasoning of the immigration checkpoint case, United States v. Martinez-Fuerte, 428 U.S. 543, 560-561, 996 S.Ct. 3074, 49 L.Ed.2d 116 (1976), properly constituted and administered sobriety checkpoints could pass Fourth Amendment scrutiny.[1]

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1. In *Martinez-Fuerte*, this Court observed that "[s]tops for questioning, not dissimilar to those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." (*Id.*, 428 U.S., at 560, 96 S.Ct., at 3084, n. 14.) Of course, stops relating to the enforcement of "safety requirements" would include not only those focused on the mechanical condition of the automobile, but also those focused on the physiological condition of its driver (in essence, the car's guidance system). This Court went on to "note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." (*Ibid.*)

In *Delaware v. Prouse*, while invalidating a random license check on patrol, this Court was careful to state, "[t]his holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise

(continued...)

As demonstrated, there is a nationwide movement to initiate sobriety checkpoints as a means of deterring the drunk driver. Following In re Lance W., 37 Cal.3d 873 (1985), the California courts are required to use the standard applied by this Court (a standard which is used by the courts of most other states), i.e., the propriety of the intrusion under the Fourth Amendment. Utilizing that standard, the California Supreme Court has upheld the constitutionality of sobriety checkpoints. (See Ingersoll v. Palmer, 43 Cal.3d 1321, 1325 (1987).) Of the other appellate courts that have addressed this issue the Supreme Courts of New Hampshire and Pennsylvania have opted to not apply the Fourth Amendment but to simply rely on state constitutional grounds. (State v. Koppel, 499 A.2d 977, 983 (1985); Commonwealth v. Tarbert, 502 A.2d 221 (Pa. 1985).)[2]

B

Survey of Sister State Decisions

In ruling on the stop of an individual walking in an alley, this Court in Brown said that "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity

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1. (...continued)
of discretion. Questioning of all incoming traffic at roadblock-type stops is one possible alternative." (*Id.*, 440 U.S., at 663, 99 S.Ct., at 1401.)

In California, the Attorney General relying on these cases and those of other states concluded that "California law enforcement agencies may lawfully utilize checkpoints in the detection and apprehension of persons driving under the influence of intoxicating substances if sufficient safeguards are taken to minimize the intrusion of a motorist. (67 Op.Cal.Atty.Gen. 471 (1984).)

2. As to the exclusion of evidence obtained from sobriety checkpoints, that option is foreclosed in California by California Constitution, Article I, section 28, subdivision (d) and *In re Lance W., supra*, at 896.

of the interference with individual liberty." (Brown v. Texas, supra, at 50-51.) To insure that an individual's reasonable expectation of privacy is not subject to arbitrary invasion at the discretion of the officer in the field "the Fourth Amendment requires that a seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitation on the conduct of individual officers." (Id., at p. 51.)

In applying this test and the rationale contained in United States v. Martinez-Fuerte, appellate courts in Arizona, California, Georgia, Illinois, Indiana,[3] Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington have concluded that properly administered sobriety checkpoints are constitutional under the Fourth Amendment.[4]

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3. When the Indiana Court of Appeal upheld a sobriety checkpoint in *State v. Garcia*, 481 N.E.2d 148, 153-154 (Ind.App. 1985), it specifically rejected another appellate opinion holding the procedure unconstitutional. (*See State v. McLaughlin*, 471 N.E.2d 1125, 1130-1134 (Ind.App. 1984).) Thus, the issue remains unsettled in Indiana.

4. The particular holdings of each state and year are as follows:

Year	State	
1989	Indiana	*Snyder v. State*, 538 N.E.2d 961 (Ind. 1989)
1988	Missouri	*State v. Welch*, 755 S.W.2d 624 (Mo. 1988)
1988	Vermont	*State v. Record*, 548 A.2d 422 (Vt. 1988)
1988	Louisiana	*State v. Church*, 530 So.2d 1235 (La. 1988)
1987	California	*Ingersoll v Palmer*, 743 P.2d 1299 (Cal. 1987)
1987	Oregon	*Nelson v. Lane*, 743 P.2d 692 (Ore. 1987)
1987	New Mexico	*City of Las Cruces v. Betancourt*, 735 P.2d 1161 (N.M. 1987)
1986	Washington	*Fury v. City of Seattle*, 730 P.2d 62 (Wash. 1986); (continued...)

In these states the appellate courts concluded that in light of the compelling state interest in deterring and detecting drunk drivers, the minimal intrusion involved and the lack of discretion afforded the officers in the field, the sobriety checkpoint satisfied the reasonableness mandate of the Fourth Amendment.

Of the states that have found constitutional difficulties with the particular sobriety checkpoints in question, at least two have subsequently upheld sobriety checkpoints. (Compare Commonwealth v. McGeoghegan, 449 N.E.2d 349, 350-353 (Mass. 1983), where record did not establish lack of arbitrar-

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4. (...continued)

(Wash. 1988)		but see *City of Seattle v. Mesiani*, 755 P.2d 775
1985	Illinois	*People v. Bartley*, 486 N.E.2d 880 (Ill. 1985)
1985	Vermont	*People v. Martin*, 496 A.2d 442 (Vt. 1985)
1985	Virginia	*Low v. Commonwealth*, 337 S.E.2d 273 (Va. 1985)
1985	Massachusetts	*Commonwealth v. Trumble*, 483 N.E.2d 1102 (Mass. 1985)
1985	Indiana	*State v. Garcia*, 481 N.E.2d 148 (Ind.App. 1985), but see *State v. McLaughlin*, 471 N.E.2d 1725
(Ind.App. 1984)		
1984	Arizona	*State v. Superior Court in and for County of Pima*, 691 P.2d 1073 (Ariz. 1984)
1984	New York	*People v. Scott*, 473 N.E.2d 1 (N.Y.App. 1984)
1984	Maryland	*Little v. State*, 479 A.2d 903 (Md.App. 1984)
1984	Georgia	*State v. Golden*, 318 S.E.2d 693 (Ga.App. 1984)
1983	Kansas	*State v. Deskins*, 673 P.2d 1174 (Kan. 1983)
1983	Kentucky	*Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky.App. 1983)
1983	New Jersey	*State v. Cocoma*, 427 A.2d 131 (N.J. Super. L. 1980)

iousness with Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985) and State ex rel. Ekstrom v. Justice Court of State, 663 P.2d 992, 993-996 (Ariz. 1983), where record was inadequate as to effectiveness of roadblocks with State v. Superior Court in and for County of Pima, 691 P.2d 1073, 1075, 1077 (Ariz. 1984).) Florida's appellate court has held that while some sobriety checkpoints may be constitutionally permissible, the one in question failed to satisfy the requirements of the Fourth Amendment. (Jones v. State, 459 So.2d 1068, 1072-1070 (Fla.App. 1984).)

Of the minority of states with appellate decisions prohibiting sobriety checkpoints [5], New Hampshire and Pennsylvania relied on state constitutional grounds [6], and South Dakota ruled

5. See *State v. Henderson*, 756 P.2d 1057 (Ida. 1988), listing 15 state courts as having suppressed evidence resulting from sobriety checkpoints (i.e. Arizona, Florida, Indiana, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, and Washington), and 19 state courts as having upheld sobriety checkpoints (Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Ohio, and Virginia). (See *Id.* 756 P.2d, at 1062, and fn. 3 [giving citations].) However, of those suppressing evidence, only 3 states, "[t]he states of Oregon, Oklahoma, and Washington have adopted *per se* rules which provide that drunk driver roadblocks are unconstitutional under any circumstances. (*Id.*, 756 P.2d, at 1063, citing *State v. Boynnorsky*, 743 P.2d 711 (Ore. 1987), *State v. Smith*, 674 P.2d 711 (Okla. 1984), *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988).) The *Henderson* court, itself, invalidated a sobriety checkpoint, but did so exclusively on state constitutional grounds, declining to adopt a rigid *per se* rule, and expressing no view as to the constitutionality of roadblocks established pursuant to administrative order. (*Henderson*, *supra*, 756 P.2d, at 1063, and fn. 4.)

6. See *Koppel*, *supra*; *Tarbert*, *supra*. The Supreme Court of Washington has ruled that a particular sobriety checkpoint program established without "authority of law" violated the more restrictive state constitution. The court in dicta went on to opine that the program gave police officers unbridled discretion to conduct intrusive searches, thereby violating the Fourth Amendment. (See *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988).) That court had previously ruled that a particular checkpoint set up to stop motorists for driver's license and vehicle check did not meet the criteria of *Delaware v. Prouse*. The latter case did not involve a sobriety checkpoint,

(continued...)

prior to the United States Supreme Court decision in Prouse and Brown. (See State v. Olgaard, 248 N.W.2d 392 (S.D. 1976).) In State v. Muzik, 379 N.W.2d 599 (Minn. 1985), the Minnesota Supreme Court held that the evidentiary showing made by the state was not sufficient to justify the use of the checkpoint. (Id., at p. 604.) In State v. Crom, 383 N.W.2d 461 (Neb. 1986), the Nebraska Supreme Court issued a limited ruling that the checkpoint violated Brown and Prouse because the stopping of any vehicle was left to the unbridled direction of the police officer.

Only a small minority of state courts (including Oregon, Oklahoma, and Washington) have adopted per se rules which provide that sobriety checkpoints are unconstitutional under any circumstance. (See e.g. State v. Boyanovsky, 743 P.2d 711 (Ore. 1987), State v. Smith, 674 P.2d 711 (Okla. 1984) [7],

6. (...continued)
and the court concluded that this particular stop, which resulted in the discovery of dangerous drugs, contained the unconstrained and unfettered discretion condemned in *Prouse*. (*State v. Marchand*, 706 P.2d 225 (Wash. 1985).)

7. Although the Oklahoma court distinguished the sobriety checkpoints from the roadblocks approved in *United States v. Martinez-Fuerte*, *supra*, it never discussed the significance of *Delaware v. Prouse* or even cited *Brown v. Texas* in its decision. It concluded that the primary purpose of the checkpoints was to seek out driving under the influence offenders, not, as law enforcement claimed, to identify and remove violators of driver license and car registration provisions.

The case contains no discussion of the deterrent purpose nor the standard announced in *Brown v. Texas*. Without considering the following criteria, *i.e.*, (1) gravity of public concerns served by seizure, (2) degree seizure advances public interest, and (3) severity of the interference with individual liberty, the Oklahoma court concluded that this checkpoint was no different than any other established to apprehend a particular type of criminal. (*State v. Smith*, 674 P.2d 562, 564 (Okla.Cr. 1984).) The entire thrust of the Oklahoma decision is reflected in its observation that such sobriety checkpoints are no different than fixing a checkpoint outside of every shopping center to check existing shoppers for sales receipts. (*Id.*, at 564.) The court relied only on the requirement of reasonable objective suspicion and ignored the language of *Brown v. Texas* regarding the standard to be applied.

City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988), these being the 3 state court decisions cited in State v. Henderson, 756 P.2d 1057, 1063 (Idaho 1988).) Two more recent decisions (including the opinion below) might arguably be added to this list. (See Higbie v. State, 1989 WL 118822 (Tex.Cr.App. 1989), and Sitz v. Department of State Police, 429 N.W.2d 180 (Mich. 1988).) It appears that these are the only state courts totally rejecting the arguments currently being accepted by the states finding sobriety checkpoints constitutional under the Fourth Amendment.

C

Independent Analysis

Clearly, a primary purpose of the checkpoint herein under consideration and in those upheld as constitutional has been the deterrence of drunk drivers. Individuals discovered by such checkpoints, unlike many other criminals, are not committing an anti-social act for financial gain or personal satisfaction. Rather, they generally believe (1) they are not intoxicated and (2) they will not be caught and can make it to their destination. What is unique about drunk drivers is that they make the final decision to drive while intoxicated. Thus, high visibility programs by law enforcement, such as announced sobriety checkpoints, heighten the potential drunk driver's awareness (1) of the potential of being stopped and (2) of society's concern with drunk drivers.

While it is frequently argued that other means of enforcement are more effective, that issue is one of reasonableness. While it may be true that increased patrols observing erratic driving may remove more drunk drivers from the streets by taking them into custody, the answer is not to be found simply in the number of arrests. Indeed, if the advance publicity and physical presence of the sobriety checkpoints are an effective means of deterring drunk drivers, fewer drunk drivers should

be arrested. The measurement of the sobriety checkpoints effectiveness cannot be made simply on the number of drunk drivers detained. (See Ingersoll v. Palmer, supra, 43 Cal.3d, at p. 1339.)

Despite increased sentences and legislative reform, drunk driving continues as a major societal concern and it has become evident that additional forms of deterrence are necessary. The carnage caused by drinking and then driving is so serious it warrants resort to both types of action, the stopping of erratically driven vehicles and the use of sobriety checkpoints to deter those who would drive after drinking and to detect those drunk drivers who have not driven in an erratic manner. (Cf. People v. Bartley, supra.)

Just because the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, in itself, render a search unreasonable. Likewise, the alleged effectiveness of other means of deterrence, i.e., strict enforcement of the statute, does not render a properly publicized and operated sobriety checkpoint, unreasonable, and hence in violation of the Fourth Amendment. (Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 2531, 37 L.Ed.2d 706 (1973); see also United States v. Martinez-Fuerte, supra, 428 U.S., at 556, 96 S.Ct., at 3082, 49 L.Ed.2d 1116, fn. 12; and United States v. Sharpe, 470 U.S.675, 687, 105 S.Ct. 1568, 1576, 84 L.Ed.2d 605 (1984).)

Amicus does not ask this Court to blindly follow the appellate decisions of the majority of state court jurisdictions which have confronted the issue of the constitutionality of sobriety checkpoints. Rather we request that this Court apply the same analysis, one directed by the Fourth Amendment, utilized by this Court in Brown, Martinez-Fuerte, and Prouse. If this is the correct test, this Court will ultimately conclude as did these other appellate courts that the legitimate public purpose served by the sobriety checkpoint, i.e., deterrence and apprehension, outweigh a minimal intrusion so long as the officer's discretion is constitutionally limited.

Whether the seizure was a reasonable one under the Fourth Amendment is determined by balancing the public interest against the objective and subjective intrusion resulting from the stop. (People v. Bartley, supra.)

In applying this test, the appellate courts have repeatedly recognized the paramount public interest in removing the drunk driver from our highways. In United States v. Brignoni-Ponce, 422 U.S. 873, 878-879, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), this Court noted the nation's major public interest in maintaining the integrity of its borders. Likewise, both this Court and the California Supreme Court have expressed the belief that the drunk driving problem is a major public concern. (See South Dakota v. Neville, 459 U.S. 553, 558, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); Burg v. Municipal Court, supra, at 262.)

Society's interest in reducing the tremendous loss of life and property damage caused by drunk drivers is no less compelling than its interest in detecting illegal aliens. While illegal immigration may cause severe economic, social and public health problems, the drunk driver is single-handedly responsible for over half of the highway fatalities. These fatalities are numbered in the tens of thousands each year. Drunk driving is not simply another crime. Like illegal immigration it has become a major social concern separate and distinct from the traditional crime problem.

Simply because a problem is of major concern to society does not render every means of deterrence or detection constitutional. No one seeks the police state envisioned by the court in Oklahoma. (State v. Smith, supra, at 564.) The means employed must serve the societal concern to a significant degree. There is no requirement that the means be the most effective method. The issue is not whether increased patrols or sobriety checkpoints are more effective in removing the drunk driver from the highways. Rather it is whether checkpoints sufficiently serve the recognized societal interest to justify the

intrusion involved. (See State v. Church, 530 So.2d 1235, 1241-1242 (La. 1988), Jones, J., concurring.)

The sobriety checkpoint is not simply a roadblock to detect criminals. Contrary to the view of the Oklahoma court, this means is specifically designed to deter or apprehend drunk drivers when they are about to, or are actually committing, the offense. Unlike the illegal immigrant or a possessor of contraband, the drunk driver may only commit the offense by using the public highways and that is where sobriety checkpoints are established.

Just as the national interest in the integrity of its borders and the arguably limited efficiency of the permanent checkpoint were sufficient to support immigration checkpoints as the means of the intrusion, the public interest in reducing the loss of life and property due to intoxicated drivers, coupled with a means directed toward the particular offense, is sufficient to overcome the relatively minor intrusion involved. The high profile sobriety checkpoints serves as a reminder to all those drinking that the chances of apprehension are increased. Whether or not this is true is irrelevant as long as the potential drunk driver perceives an increased danger of detection.

The checkpoint does advance the state's interest in deterring the drunk driver, even more so than the immigration checkpoint deters the illegal alien intent on entering the country. The level of interference has been limited by the procedures employed, i.e. (a) advance publicity, (b) short duration of stop, (c) limited discretion given the officer in the field. These were present in the cases cited and are present in the current checkpoint under consideration.[8]

Consequently, this Court should conclude after applying the Fourth Amendment standard of reasonableness, that not only may a sobriety checkpoint designed to deter and detect those driving under the influence be constitutional, but as

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8. See Footnote 4.

pointed out by the petitioners and supported by the record, the sobriety checkpoint in question was constitutional.

CONCLUSION

This Court stated almost thirty years ago that "the increasing slaughter on our highways, most of which could be avoidable,

now reaches the astounding figure only heard of on the battlefield." Breithaupt v. Adam, 352 U.S. 432, 439 [1 L.Ed.2d 448, 77 S.Ct. 408] (1957), emphasis added.) The passage of time has only increased the need to uphold the circumscribed procedures of the sobriety checkpoint.

Respectfully submitted on behalf of the
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